In The

Supreme Court of the United States

October Term, 1977

No. 77-677

OWEN EQUIPMENT AND ERECTION COMPANY,
A Nebraska Corporation,

Petitioner,

vs.

GERALDINE KROGER, Administratrix of the
Estate of JAMES D. KROGER, Deceased,

Respondent.

REPLY BRIEF OF PETITIONER

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OTHER AUTHORITIES

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ARGUMENT

Respondent has set forth in her brief arguments and comments for which neither case law nor support in the record exists. These points will be addressed by petitioner in the order in which they appear in respondent's brief.

I.

Respondent cites the case of *Dery v. Wyer,* 265 F. 2d 804 (C. A. 2d, 1959), as authority for the rule:

> "In addition to the right of a defendant to implead a third-party defendant, a plaintiff may assert a claim against such third-party defendant if that claim arises out of the transaction that is the subject matter of plaintiff's claim against the original defendant." (Respondent's brief, page 9).

The case of *Dery v. Wyer,* supra, does not stand for that proposition. That case involves the power of a federal court under the doctrine of ancillary jurisdiction to try the claim by a defendant against a third-party defendant unsupported by an independent basis of jurisdiction after the main action between the plaintiff and defendant has been settled. The Second Circuit set forth its holding as follows:

> "In this case, we hold, the jurisdiction which the court below had acquired over the plaintiff's claim was broad enough to comprehend jurisdiction of the ancillary third-party claim and that the ancillary jurisdiction attached when the impleader was accomplished.
>
> "We also hold that the ancillary jurisdiction over the third-party complaint was not lost when the main cause of action was settled."

That case did not involve the same alignment of parties as that which is now before this court—a claim by a plaintiff against a third-party defendant unsupported by an independent basis of jurisdiction.

Respondent has been unable to cite to this court any Court of Appeals decision in support of its position that

an independent basis of jurisdiction is not required before a plaintiff may assert a claim aaginst a third-party defendant.

Petitioner does not quarrel with the rule of *Dery v. Wyer.* The defendant, Omaha Public Power District, did have the right to file a third-party complaint against petitioner. What petitioner does object to is a rule allowing a plaintiff to assert a state law claim against a third-party defendant with whom plaintiff has a common basis of citizenship.

II.

Respondent claims that the decision in its favor will not expand jurisdiction to increase federal litigation. In support thereof, respondent lists seven different factors peculiar only to this case and implies that unless those specific factors are present in another case that the rule established by a judgment in favor of respondent in this case would be inapplicable. For instance, several of the specific factors which the plaintiff claims would be necessary are:

> "1. A geographical confusion such as exists west of the Missouri River as to a shred of Iowa.
>
> "2. A company that is incorporated in Nebraska and signs its pleadings, 'A Nebraska Corporation,' yet places its claims, not exclusively but most of the time, in that shred of Iowa." (Respondent's brief page 18).

That assertion of respondent is absolutely preposterous. The rule which plaintiff demands of this court is that a plaintiff may assert a state law claim against a third-party defendant having common citizenship with the

plaintiff, without an independent basis of jurisdiction. That can do nothing but expand jurisdiction and increase federal litigation.

III.

Respondent claims that petitioner's answer was not sufficient under Rule 8 (b), because it was a general denial admitting that petitioner was organized and existing under the laws of the State of Nebraska, but denying each and every other allegation in the complaint. Rule 8 (b) provides in part:

> "Unless the pleader intends in good faith to controvert all averment of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all averments except such designated averments or paragraphs as he expressly admits; . . ."

The answer which petitioner filed to the complaint of the respondent complied in all respects with that rule.

The case of *Biggs v. Public Service Coordinated Transport,* 280 F. 2d 311 (3rd Cir. 1960), cited by respondent has no application. In that case the defendant generally denied all allegations as to corporate citizenship. The defendant failed to specifically deny, however, that it was a New Jersey corporation.

In the instant action the petitioner admitted that it was a corporation organized and existing under the laws of the State of Nebraska but denied each and every other allegation contained in the plaintiff's complaint. Rule 8 (b) provides that a general denial is sufficient as to all averment "including averments of the grounds upon which

the court's jurisdiction depends". Moreover, it is obvious that from the evidence adduced in the *Biggs* case, there was no question but that the defendant was a New Jersey corporation which served as a basis for the finding of the court.

In the trial of the instant matter in proceedings held outside the hearing of the jury, counsel for the respondent attempted to allege that petitioner had admitted paragraph 2 of the respondent's amended complaint which paragraph contained the jurisdictional allegation. The colloquy between counsel and the court was as follows:

> The Court: The only thing that concerns me is this pendant or ancillary question. I once had jurisdiction and then because one defendant is dismissed out of it, do I still retain the case? He is going to present a brief to that and then I want you to answer it. That does worry me. There is no question in my mind that it is proper to have jurisdiction against a sole defendant, say they just sued Owen Equipment alone, that you had to allege they had to be a Nebraska corporation and they had their principal place of business in Nebraska.
>
> Mr. Dinsmore: I agree with the Court.
>
> The Court: And the proof shows that they had their principal place of business in Carter Lake, Iowa, and you did allege it in the amended complaint that they were a Nebraska corporation and they had their principal place of business in Nebraska.
>
> Mr. Dinsmore: Is that in the amended complaint?
>
> The Court: That is in the amended complaint.
>
> Mr. Dinsmore: I am sure the Court is correct.
>
> The Court: That the defendant Owen Equipment and Erection Company is a Nebraska corporation with its (Page 208) principal place of business in Nebraska.

Mr. Dinsmore: Is that paragraph one or two?

The Court: That is paragraph two of the amended complaint filed November 9, 1973.

Mr. Dinsmore: Which I think they admitted in their answer.

Mr. Johnson: No, we did not.

The Court: *I don't think they ever admitted anything. The proof here before this Court today by the secretary of the Owen Equipment and Erection Company, their principal place of business was in Carter Lake, Iowa.* That is the proof before the Court so there is a question here and it can only be obviated if this Court has pendant or ancillary jurisdiction. That is the point that I want to check overnight, but I am going to take that motion under advisement and I will be able to tell you something about it tomorrow morning but I will require you to proceed while I am taking it under advisement. (Emphasis added.) (C. A. Appendix, Vol. II, pp. 160 and 161).

The first time the sufficiency of the petitioner's answer was contested was in the opinion of the Court of Appeals, wherein the court stated:

> "This form of answer was in violation of Fed. R. Civ. P. 8 (b) which provides that '(W)hen a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and deny only the remainder.'" (Appendix to Petition for Certiorari, App. 4).

An examination of the index of the brief of the respondent (appellee) on appeal, United States Court of Appeals for the Eighth Circuit reveals that the matter of defendant's answer was never discussed nor was Rule 8 (b) cited or ever mentioned therein. It is obvious that respondent *conceded* as sufficient petitioner's answer as initially filed herein.

IV.

The respondent contends that petitioner is amiss in its claim that the issue of the concealment of the citizenship of petitioner never matured until oral argument was had before the Eighth Circuit. In support thereof, respondent cites from two memorandums of the trial court (Respondent's brief, pages 27 and 28).

In neither of those Memorandum Opinions, however, is there any claim of concealment. The court questioned the *lateness* of the raising of the issue of lack of diversity of citizenship but never raises the issue of concealment. Moreover, the court emphasized that the issue could be raised at any time and that the *only* thing that concerned the court was the question of pendent or ancillary jurisdiction not the time when the issue was raised (A. 96). The respondent has had several opportunities before this court to explain those comments of the court and their relation to these proceedings but as of this time has failed to do so. It is clear that the only issue before the trial court was that of pendent or ancillary jurisdiction. Concealment was never a factor.

Respondent complains of the affidavits of counsels for petitioner included in the appendix at pages 102 and 103. Those affidavits were submitted by petitioner after what appeared to petitioner to be unwarranted findings on the part of the Court of Appeals for the Eighth Circuit as to the issue of concealment. Those affidavits were made a part of the petition for rehearing filed by re-

spondent in the Court of Appeals for the Eighth Circuit. If respondent desired to counter those affidavits, she could have done so at that time.

It is now claimed by respondent on appeal that:

> "Had the affiant in that affidavit been subject to cross-examination, the affiant could have been confronted with the certificate of incorporation attached as an appendix hereto. This shows that from October 21, 1946 to the present time petitioner's principal place of business was at all times in Omaha, Nebraska."

Counsel for respondent called as a witness, Herbert M. Peterson, the corporate secretary of petitioner. On cross-examination by Mr. Johnson, Mr. Peterson testified as follows:

By Mr. Johnson:

Q. Mr. Peterson, I have just a few questions. As an officer of the Owen Equipment and Erection Company corporation and specifically just by way of general background here, on November 9, 1973 when the amended complaint was filed by Owen Equipment Company in this case, the corporation was organized, as I understand it, in Nebraska, is that right?

A. Yes.

Q. And at that time it had its, as I understand it, principal place of business in Carter Lake, Iowa?

A. Yes.

(Page 174) Q. Where the corporate offices were, have been, and still are?

A. Yes.

Q. Since November of 1973 has the income of Owen Equipment and Erection Company been—

Mr. Dinsmore: Excuse me. May I approach the bench, Your Honor? I have an objection to make and I would like to make it out of the presence of the jury.

The Court: Step up here, gentlemen.

(The following proceedings was held at the bench.)

Mr. Dinsmore: Judge, I believe that Mr. Johnson is getting into an area trying to evoke sympathy from the jury.

Mr. Johnson: No, I am not.

Mr. Dinsmore: To show that Owen Equipment has a very little income and so that therefore any verdict rendered should be very minimal. In anticipation of that, with any inquiry as to the limited income or minimal amounts of Owen Equipment Company, if he does get into that, then I would like to have the right to show what the limits of the insurance policy is.

The Court: What is the purpose of your (Page 175) question?

Mr. Johnson: For two reasons. Primarily by way of background in this case and second just to show what the cranes rent for.

The Court: You asked him what the income was.

Mr. Dinsmore: And how much he got from the rental of the crane.

I did not ask about that and I just didn't get into it.

Mr. Johnson: I don't intend to get into it in quite this way and perhaps I can ask a different question.

The Court: And what is the nature of it?

Mr. Johnson: The nature of this is this: In addition to having corporate offices in Carter Lake, Iowa, where the executive officers are of the corporation, that since this suit was filed, we contend the income derived by the corporation has been solely from the rent of these two cranes to Paxton and Vierling and I want to show the amounts, what times without referring to anything else.

The Court: I will let you ask that question.

Mr. Dinsmore: Okay.

(End of the conference at the bench.)

Q. (By Mr. Johnson) Mr. Peterson, in addition to (Page 176) having the corporate offices or principal place of business in Carter Lake, Iowa, is that where the executive officers, so to speak, of the corporation were in 1973 and have been since that time?

A. Yes.

(C. A. Appendix, Vol. II, pp. 136 and 137.)

On re-direct examination, counsel for respondent could have easily examined Mr. Peterson as to the principal place of business of petitioner as shown in the certificate of incorporation. However, that question was never asked.

Respondent cites the case of *Kibler v. Transcontinental and Western Air, Inc.*, 63 F. Supp. 724 (Eastern Dis. N. Y.), in support of its proposition that the principal place of business of a corporation is that which is designated in the charter or certificate. That case does not deal with diversity jurisdiction. It has absolutely no application to this appeal.

That case involved citizenship as it relates to *venue only* and not to diversity of citizenship for subject matter

jurisdiction purposes. The entire quote, of which respondent set forth only a part, reads as follows:

> "It has been held for the purposes of venue that the 'residence' of the usual corporation is the county in which the principal office or principal place of business is located. . . . In the case of a domestic corporation, its principal place of business is the location it so designates in its charter or certificate of incorporation. In the case of a foreign corporation, it is the location it so designates in its application for a certificate of authority to do business in the state as required by Section 210 of the General Corporation Law of the State of New York, Consol. Laws, c. 23."

However, it is obvious that even if it be assumed that the Certificate of Incorporation of petitioner is a valid portion of the record, it is not relevant as to petitioner's principal place of business. The statement of what the principal place of business of the corporation was in August of 1968 has no application to its principal place of business at the time the suit was filed five years later in 1973. Corporate headquarters and assets were all located in Carter Lake, Iowa and all corporate decisions and meetings occurred there. Even the president of petitioner, Ed Owen, testified in a deposition taken almost two years before the trial, that the principal place of business of petitioner was Carter Lake, Iowa. This has never been subject to dispute.

Generally, there are two basic tests used in determining the principal place of business of a corporation. One is the "nerve center" theory which would place emphasis on the location of the headquarters of the company. The other is the "operating assets" or "center of corporate activity" theory which would favor the state

where the corporation had the greatest contact with the public, i. e., had the largest number of employees, the greatest amount of assets, and derived the most income. *Bullock v. Wiebe Construction Company; Mahoney v. Northwestern Bell Telephone Company,* 258 F. Supp. 500 (D. Neb. 1966). It is obvious from the fact that there are two different tests that the courts are not in agreement as to which test should be applied in determining where a corporation's principal place of business is located. For various reasons, this split of authority has little bearing on the case at hand.

First, in *Mahoney v. Northwestern Bell,* the court found:

"It is the opinion of this Court, however, that the split of authority is largely linguistic. Even the cases which have taken the 'operating assets' approach have not ignored the location of the executive offices and of management activity. *Gilardi v. Atchison, Topeka and Santa Fe Railway Company,* 189 F. Supp. 82 (N. D. Ill. 1960); *Huggins v. Winn-Dixie Greenville, Inc.,* 233 F. Supp. 667 (E. D. S. C. 1964); *Kelley v. United States Steel Corporation,* 284 F. 2d 850 (3rd Circuit 1960). Conversely, those cases which recognize the 'nerve center' test have not done so without considering the location of the company's operations. In fact, all of the cases which have come to the attention of this Court agree that determination must be based on the facts of each individual case. The 'nerve center' approach would create a fictional principal place of business where a company's executive offices are located in one state and all of its business is transacted in another. *Bullock v. Wiebe Construction,* 241 F. Supp. 961 (S. D. Iowa 1965). In the same respect, the 'operating assets' test would not be adequate where a company's business is disbursed relatively equally among several states. In such a

case, the location of the executive offices assumes a greater importance. *Anderson v. Southern Bell Telephone and Telegraph Co.,* 209 F. Supp. 921 (M. D. Ga. 1962), *Egan v. American Airlines, Inc.,* 324 F. 2d 565 (2nd Circuit 1963), *Scot Typewriter Company v. Underwood Corporation,* 170 F. Supp. 862 (S. D. N. Y. 1959), *Textron Electronics, Inc. v. Unholtz-Dickie Corporation,* 193 F. Supp. 456 (D. Conn. 1961)."

That court was of the opinion that neither test is sufficient by itself to determine the principal place of business for purposes of § 1332 (c). The various factors used in determining the principal place of business are given greater or lesser weight according to the particular fact circumstances.

In the instant case, at the time this action was commenced, corporate headquarters of petitioner were located in Carter Lake, Iowa. Furthermore, all major policy decisions of the corporation were made at its corporate headquarters in Carter Lake, Iowa. These factors embrace a "nerve center" theory. In *Mahoney v. Northwestern Bell Telephone Company, supra,* the court clearly relied upon the "nerve center" theory in determining Northwestern Bell's principal place of business. In that case, the plaintiff alleged that she was a citizen of the State of Nebraska and that the defendant, Northwestern Bell Telephone Company, was a citizen of Iowa, thereby creating diversity of citizenship within the meaning of 28 U. S. C. § 1332, Paragraph (c). Northwestern Bell, however, was engaged in supplying communication services in the states of Iowa, Nebraska, South Dakota, North Dakota, and Minnesota. Its assets were variously distributed among those five states, with Minnesota and Iowa

containing the greatest share of the assets relative to the other states. The corporation's income, which was derived from these assets, was also variously distributed among the states, again with Iowa and Minnesota having the greatest share of profits relative to the other states. Similar proportions existed among the five states as to the number of telephone service units, telephone operators, and total employees. Of all the states, Minnesota clearly had the greatest proportion of any of the above items.

The court refused to designate Iowa as the principal place of business for the corporation on the basis of these factors. The court noted that although the day to day business of the company was handled by the regional offices in each state, the Omaha, Nebraska, office directed the methods, procedures, and standards of operation which provided the regional offices with rules for the day to day operations of the business. All of the major policy decisions were made in Omaha and the offices of all of the officers were also located in Omaha. It was therefore held that the "nerve center" of the business was clearly Omaha, Nebraska.

> "Where no one state is clearly the center of corporate activity, or accounts for a majority of the company income, the headquarters logically assumes greater importance in the determination. This is especially true where the activities conducted by the company are necessarily uniform and extensive coordination of operations is imperative. These considerations indicate that Nebraska is the principal place of business of the defendant, Northwestern Bell Telephone Company. As such, diversity is lacking, and this court does not have jurisdiction over the action."

Applied to the instant case, the "nerve center" theory clearly indicates that Carter Lake, Iowa, is the principal place of business of petitioner. The corporate headquarters were located in Carter Lake, Iowa, all major decisions were made at the headquarters, and the offices of the corporate officers were also located in the headquarters at Carter Lake, Iowa. For purposes of 28 U. S. C. § 1332, Paragraph (c), petitioner is also a citizen of Iowa, creating a lack of diversity. Furthermore, the petitioner has no other place of business whatsoever, so there could be no other "nerve center". Not only is petitioner's principal place of business located in Carter Lake, Iowa, but also its only place of business is located in Carter Lake, Iowa.

Moving to the "operating assets" or "center of corporate activity" theory of determining the location of the principal place of business, the principal assets from which petitioner derived the majority of its income were located in Carter Lake, Iowa, at the time this suit was commenced. These assets consisted of two cranes titled and licensed in the State of Iowa and leased to Paxton-Vierling Steel Co. on the premises in Carter Lake, Iowa. All of the books and records of the corporation were kept at these offices. The petitioner was engaged in only one business activity: the leasing of cranes for use in Carter Lake, Iowa.

In *Bullock v. Wiebe Construction Company,* 241 F. Supp. 961 (S. D. Iowa, 1965), the plaintiff, an Iowa citizen, brought suit in Federal Court against nine defendants. The court raised the issue of jurisdiction of the subject matter over concern as to whether the principal

place of business of one of the defendants was in the State of Nebraska or in the State of Iowa. The relevant facts concerning this defendant are stated in the case as follows:

> "The sole business of said defendant is the leasing of lands and buildings, which it owns, to various retail companies and other business establishments in the Spencer Shopping Center, Spencer, Iowa. The executive offices are located at Ralston, Nebraska. The corporation has no resident manager located at the shopping center. All directors are citizens of the State of Nebraska, except one who is a citizen of Michigan. All of the officers are citizens of the State of Nebraska and the corporate meetings are held in Nebraska. . . . Essentially all of the management and administration of the corporation's business is performed at its office in Ralston, Nebraska."

Emphasizing the fact that the defendant was in the sole business of leasing land and buildings in Spencer, Iowa, also that the defendant corporation's income was earned by the corporate assets, i. e., the lands and buildings, located at Spencer, Iowa, and the fact that the majority of the corporation's context with the public occurred at Spencer, Iowa, the Court held that the principal place of business of said defendant was at Spencer, Iowa. The court stated its reasoning for not relying on the location of the management and administration of the corporation's business in determining its principal place of business as follows:

> "Corporate management and internal corporate activities, such as Board of Directors meetings, appeared to the Court to be entitled to less weighted consideration when the producing assets are completely confined, as in the present case, to one state

> and that one state is other than the state in which the corporate management and internal activities take place. On the other hand, if the court were concerned with a larger corporation with production assets or production activities in many states, then such factors as corporate management and the internal corporate activities could be of considerable more importance."

The Court then dismissed the case as to all defendants.

Applying the holding of that case to the case at hand, petitioner was in the sole business of leasing its principal assets, i. e., the cranes, which were located, licensed, and titled, in the State of Iowa, and such assets provided the defendant with its income. Considering these facts alone, there is no question of their similarity to the facts in the *Bullock* case which clearly puts petitioner's principal place of business in Carter Lake, Iowa, thereby destroying complete diversity.

Moreover, the respondent long ago *conceded* that the principal place of business of petitioner was Carter Lake, Iowa. The trial court, in its memorandum overruling the defendant's motion for dismissal for lack of subject matter jurisdiction, found:

> "Plaintiff, an Iowa citizen, alleged that jurisdiction was based upon 28 U. S. C. Section 1332; that the defendant is incorporated in the State of Nebraska and has its principal place of business there. *It is now uncontroverted, however, that defendant's principal place of business is in the State of Iowa.* Hence, an independent basis of jurisdiction does not exist." (A. 55) (Emphasis added.)

Respondent never raised this as an issue before the Court of Appeals. In the case of *Nealy v. Martin K. Eby Construction Company,* 87 S. C. 1072 (1967), this court found:

> "In a short passage at the end of her brief to this court, petitioner suggested that she has a valid ground for new trial in the district court's exclusion of opinion testimony by her witnesses concerning whether respondent's scaffold platform was adequate for the job it was intended to perform. This matter was not raised in the Court of Appeals or in the petition for a writ of certiorari, even though the relevant portions of the transcript were made a part of the record on appeal. Under these circumstances, we see no cause for deviating from our normal policy of not considering issues which have not been presented to the Court of Appeals and which are not properly presented for review here. Supreme Court Rule 40 (1) (d) (2)."

In the "memorandum to counsel in cases granted review on January 9, 1978" directed to counsel involved in this matter by Michael Rodak, Jr., Clerk, this court indicated that the appendix was to be printed and ready for filing by February 23, 1978. This court also urged the parties to the action to agree as to the contents of the appendix. Under the fifth paragraph of that memorandum, if no agreement was reached, then counsel for petitioner was to designate the portions of the record to be printed by January 19, 1978 and counsel for the respondent was to have cross-designated by January 30, 1978. The rule specifically provides that "those dates must be kept."

On January 18, 1978, counsel for petitioner forwarded to counsel for respondent a designation of those portions of the records to be included in the appendix including pleadings and other portions of the record, including the affidavits of counsels for petitioner. Also included was a statement of the issues presented for review pursuant to Rule 36(2) of the Supreme Court Rule. Those issues are

identical to the issues which appear in the brief of petitioner on writ of certiorari. It is to be noted that no question was ever raised as to whether or not the court erred in finding that the principal place of business of petitioner was Carter Lake, Iowa. Nor was the Certificate of Incorporation, now attached to respondent's brief on appeal to this court, included in the designation of portions of records to be included in the appendix. If respondent had intended to include anything other than that which was designated by counsel for petitioner, she was to so indicate it by January 30, 1978. Petitioner received no such indication from counsel for respondent.

Moreover, in paragraph 3 of the Memorandum Re Printing, which accompanied the above referred to memorandum to counsel, the court emphasized "in no event shall any documents or items not in the certified record be reproduced in the appendix." The Certificate of Incorporation was never in the certified record. It should not have been reproduced on appeal.

—o—

CONCLUSION

The burden of proving the principal place of business was upon the respondent. It was respondent who was attempting to invoke the jurisdiction of the federal court.

Petitioner, therefore, respectfully requests that since respondent failed to sustain that burden of proof, that this court find that the trial court did not have the power to

hear this matter and accordingly reverse the judgment of the Circuit Court and dismiss for lack of jurisdiction.

Respectfully submitted,

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